U.S. Department of Labor

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Issue Date: 20 November 2003

CASE NO.: 2003-STA-21

IN THE MATTER OF

ALLEN R. MASON,
Complainant

v.

CB CONCRETE COMPANY,
Respondent

APPEARANCES:

John G. Platt, Esq.
On behalf of Complainant

Mark S. Sertic, Esq.
Robert S. Larsen, Esq.
On behalf of Respondent

Before: Clement J. Kennington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protections provisions of the Surface Transportation Assistance Act (Act) of 1982, as amended and re-codified, 49 U.S.C.A. § 31105 and the implementing regulations at 29 C.F.R. § 18.1 *et. seq.*, and 29 C.F.R. § 1978.100 *et. seq.*, (2001). Under Section 31105(a) of the Act a person is prohibited from discharging, disciplining or discriminating against an employee regarding pay, terms, or privileges of employment because the employee has filed a complaint or begun a proceeding related to a violation of commercial motor vehicle safety regulations or refuses to operate a vehicle because to do so would violate a regulation, a standard, or order of the United States related to commercial motor vehicle safety, or health, or the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle's unsafe condition. Under Section 31105(a)(2) reasonable

apprehension is defined as that which a reasonable employee in the circumstances then confronting said individual would conclude to be unsafe so as to establish a real danger of accident, injury, or serious impairment to health provided that employee sought but was unable to obtain correction of the unsafe condition.

The Act, thus, protects employee complaints about vehicle safety-related issues ranging from voicing of concerns to one's employer to the filing of formal complaints related to commercial motor vehicle safety. 49 U.S.C.A.§ 31105 (a)(1); *see Young v. Schlumberger Oil Field Servs.* ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 3-8 (ARB Feb. 28, 2003). The Act also protects two categories of work refusals commonly referred to as "actual violation" and "reasonable apprehension." 49 U.S.C.A.§ 31105(a)(1)(B)(i), (ii); *see Ass't Sec'y v. Consol. Freightways (Freeze)* ARB No. 99-030, ALJ No. 98-STA-26. Slip. Op. at 5 (ARB Apr. 22, 1999). For an employee to be protected under the complaint clause, it is necessary that complainant be acting on a reasonable belief regarding the existence of a violation. *See Clean Harbors Envtl. Servs. v. Herman* 146, F.3d 12, 221 (1st Cir. 1998). For an employee to be protected under the actual violation category, the record must show that the employee's driving of a commercial vehicle would have violated a pertinent motor vehicle standard. 49 U.S.C.A. § 31105 (a)(1) (B)(i); *see Freeze,* slip op. at 7. Under the reasonable apprehension category, an employee's refusal to drive is protected only if based on an objectively reasonable belief that operation of a motor vehicle would pose a risk of serious injury to the employee and public, and the employee has sought but been unable to obtain correction of the unsafe condition. 49 U.S.C. A. §31105 (a)(2). *See Young*, slip op at 8; *Freeze*, slip op. at 7.

I. STATEMENT OF THE CASE

On February 4, 2002, Complainant (Al Mason) filed a complaint against CB Concrete Company (Respondent), alleging that Respondent terminated him in retaliation for making internal safety complaints and refusing to drive because of excessive fatigue, which if done, would violate motor carrier safety regulations.[1] The Department of Labor, Occupational Health and Safety Administration investigated the complaint and dismissed it as lacking merit on January 7, 2003. (RX-49, 50). Complainant filed objections to OSHA's determination and requested a hearing which was held before the undersigned on April 15, 2003, and August 12, 2003 in Reno, Nevada.

At the hearing, Mason was represented by Attorney John G. Platt. Attorney Mark S. Sertic represented Respondent. All parties were afforded the opportunity to adduce testimony, offer evidence, and submit post hearing briefs. While the parties introduced a total of almost 190 exhibits and disagreed over many factual conclusions, most of the underlying facts were undisputed.

[1] Complainant, like other witnesses, are referred to by their last name.

Mason testified, called two witnesses, Larry Smith (former ready mix-driver for Respondent), Sharm Lynn Layton (former plant manager for Respondent) and introduced 138 exhibits which were admitted including: Mason's employment application (CX-1); disciplinary action taken against Mason (CX-2 through 14); Mason's driver daily work sheets for September 14; October 12,13, 16, 18, 19, 23; November 27; December 5, 2000; January 4, 8, 11; February 15, 1, 19, 20, 26, 28; March 23, 2001 (CX-15 through 35); Mason's vehicle inspection reports of February 27, March 9, April 13, May 2, June 27, July 25, 26, 27, 30, 31 and August 2, 2001 (CX-36 through 42, 46 through 51); driver dispatch sheets for February 1, 6; April 25; May 25, 29, 30; June 27, 28, 30, 2001 (CX-52-59, 61); collective bargaining agreement between Respondent and Teamsters Local 53 referred to as Teamster Transit Mix Agreement (CX-62); Respondent's Ready Mix Driver Manual (CX-63); notices from Respondent to employees concerning work practices (CX-64 through 71); memos from Respondent to employees concerning work practices (CX-72 through 76); training certificates and safety awards received by Mason prior to his employment with Respondent (CX-77 through 83); Respondent's driver accident summary for June, 1997 to November 1999 (CX-84); material safety data sheet for superplasticizer (CX-85); disciplinary action taken by Respondent against ready -mix driver J.D. Drucker (CX-86 through 92); termination of driver, Darrin Lambert by Respondent on October 30, 2000 for recklessness and abuse of equipment (CX-93); disciplinary action taken by Respondent against ready mix drivers Vernon Stallard, Bobby Pratt, Frank McDonald, Paul Howard, Todd Kirsten, Steve Carr, Gary Knight, Kory Gibson, Tim Kuhl, and Temple Webb (CX-94 through 128); pay records of Carr, Howard, McDonald, Mark Duton, Michael Delaney, Gibson, Charles Sills, and Joseph V. Stocz (CX-129 through 137, and 143); Mason's driver vehicle inspection report for March 29, 30, 31, April 1, 3,6, 7, 10, and 24; June 8, 9, and 12, 2001 (CX-138, 140, 141); and Respondent's answers to discovery. (CX-139, 142). [2]

Respondent introduced 51 exhibits which were admitted including driver vehicle inspection reports and driver daily work sheets filled out by Mason, together with disciplinary action taken against Mason for infractions of company rules (RX-1 through 21, and RX-24 through 27); disciplinary action taken against other ready mix-drivers (RX-28 through 45); Respondent's drivers manual (RX-46); collective bargaining agreement between Respondent and Teamsters Local 53 (RX-47); material data safety sheet onsuperplasticizer (RX-48); OSHA's notice to Respondent about Mason's complaint, together with their finding, and Mason's objections to said findings. (RX-49 through 51).

Mason asserts that he raised internal safety complaints over a long period of time starting in April, 1999, to be met only by progressive disciplinary action from Respondent commencing with verbal, then written warnings followed by suspension, and eventual termination on August 7, 2001. Mason contends that Respondent had no legitimate non-discriminatory reason for the adverse employment action and that the reasons Respondent advanced were in part pre-textual. Further, there was evidence of disparate treatment and a nexus between protected activity and adverse employment action, showing that Respondent retaliated against Mason for engaging in protected activities in

[2]Complainant's exhibits are referred to as CX-___p.___. Respondent's exhibits are referred to as RX-___p.___. The hearing transcript is referred to as Tr.___.

violation of the Act.[3] Respondent on the other hand, contends that prior to his discharge Mason had a significant decline in job performance and attitude resulting in issuance of verbal and written warnings followed by suspension and then discharge due to refusal to abide by legitimate work rules. After reviewing the entire record, as detailed below, the Court is convinced that Respondent had just cause for disciplining and terminating Mason, and that Mason's protected activity played no part in Respondent's decision to discipline him. Thus, Respondent did not violate the Act by warning, suspending, or discharging Mason.

II. ISSUES

1. Whether Respondent warned, suspended, discharged, or otherwise discriminated against Mason in violation of section 31105 (a)(1) the Act, because of Mason's activity in raising internal safety complaints with Respondent concerning: (a) an inability to safely deliver concrete on April 28, 1999; (b) inadequate time to prepare pre or post-trip inspection reports as required by Federal Motor Carrier Safety Regulations, 49 C.F.R. § 393.13; (c) dangerous delivery conditions to a customer located off highway 80 on May 1, 2001; or (d) excess fatigue on June 27, 2001.

2. Whether Respondent warned, suspended, discharged or otherwise discriminated against Mason in violation of Section 31105 (a)(1)(B)(i)(ii) of the Act, because of Mason's action in refusing to: (a) deliver concrete on April 28, 1999; (b) transport a water control substance known as "superplasticizer" on November 22, 2000; and (c) drive on April 25, May 1, 28, 29, June 28, and 29, 2001.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

Respondent is a person and a commercial motor carrier within the meaning of Sections 31101 and 31105 of the Act. Respondent is owned by Granite Construction and engaged in the manufacture and transportation of concrete by commercial motor vehicles, ready-mix cement trucks, with a ready-

[3] In its brief at pages 11 and 12, Mason contends that Respondent violated its collective bargaining, Ready Mix agreement with Teamsters Local 533 when it discharged him by failing to follow progressive discipline as outlined in Article 13, Section 2 of that agreement. The issue of whether Respondent allegedly violated this agreement is not before this Court. Rather, as noted above, the issues to be resolved deal with whether Respondent violated any provision of Act when it disciplined Mason. However, it should be noted that Article 13, Section 1 of that agreement provides that Respondent, can immediately discharge an employee without going through progressive discipline when the employee commits one of eleven major infractions including "abuse of equipment" which the Court finds Mason did. In order to provide the context in which Mason worked, Sections 13 and 14 are set forth *infra* at pages 5-7 of this decision.

mix plant located in Sparks, Nevada. Respondent employs about 60 truck drivers utilizing 60 trucks in its operations delivering concrete to various commercial and residential job sites within a 50 mile radius of Sparks. On occasion, Respondent delivers concrete for Capital City Concrete which has a ready mix facility in Carson City, Nevada, and is also owned by Granite Construction. (Tr. 482, 483).

Respondent's business is highly competitive with a premium placed upon customer service. (Tr. 59).[4] Respondent's customers, especially those involved in commercial construction, demand prompt deliveries at either 15, 20, or 30 minute intervals with specified wetness or slump levels.[5] Failure to meet these schedules or moisture content can and does result in back charges and rejected loads. (Tr. 79, 90). Periodically, Respondent reminds its drivers of these consequences and of the need for prompt attendance and observance of work and job safety rules. (Tr. 138, 139). For those who did not comply, Respondent applied a system of progressive discipline as outlined in its collective bargaining agreement with Teamsters Local 533. (CX-62; Tr. 92-113)[6]

In May, 1995, Mason began working as a ready mix driver for Respondent under the supervision of plant manager Layton, who in turn, reported to facility and general managers, Christopher D. and Stephen C. Benna. (Tr.10, 210). Layton supervised Mason until his termination on August 7, 1991. In 1997, when Granite Construction Company began its buy out of Respondent, all employees including Mason were required to fill out new employment applications. Mason's application showed him to possess over 20 years of mixer driving experience in California and Nevada. Currently, Mason is 54 years old and employed as a dump truck driver for Rainbow Rock. (CX-1, Tr. 319).

Mason like other ready-mix drivers worked under the Ready Mix Agreement. Article 13 of this agreement entitled "Discharge and Suspension" set forth the basis for employee discipline and read as follows:

> Section 1: The employment relationship between Employer and Employee is based upon mutual consent and may be terminated by either Employer or Employee. An

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[4] In 1997, Granite Construction began a 5 year buy out of Respondent and has continued Respondent's operations to the present. (Tr. 10, 457).

[5] Drivers frequently carried in their truck cab or tank a concentrated water reducer or superplasticizer which allowed them to increase the slump without hurting the concrete strength. (Tr. 169, 170).

[6] The collective bargaining agreement known as Teamsters Transit Ready Mix Agreement (Ready Mix Agreement) applicable in this case was effective from November 15, 1997 through November 15, 2003. The union's full name is Teamsters, Chauffeurs, Warehousemen, Helpers and Professional, Clerical, Public and Miscellaneous Employees of Local Union No. 533 of Reno and Northern Nevada, affiliated with the I.B.T. & AFL-CIO.

Employee may only be disciplined, suspended or discharged for just cause related to work or while on the Employers property. Cause for immediate suspension or discharge without prior notice may result for the following major infractions:

Dishonesty
Drunkenness
Recklessness
Recklessness
Substance Abuse
Selling, transporting of, or use of illegal narcotics
Physical assault on a supervisor
Abuse of equipment
Abuse of customer
Uninsurability due to bad driving record according to the Employer's insurance Company
Theft of property which involves the Company, its employees or its customers

Section 2: The Company agrees to observe a policy of progressive, corrective discipline for minor infractions as follows:

a. Verbal Warning
b. Written Warning
c. Suspension from duty
d. Discharge from service

The company may not apply discipline of a progressive nature to infractions of different natures. Progressive disciplinary action may only be applied to infractions of a similar nature.

Section 3: Any disciplinary notice shall not remain in effect for a period of more than twelve (12) months from the date of occurrence which gave rise to such disciplinary notice. In this Article, "days" shall mean Monday through Friday, excluding Saturdays, Sundays or Holidays. To be valid, discipline must be issued within five (5) calendar days of an infraction and/or when the Company becomes aware of an infraction. Failure to act within the specified five (5) days, shall waive the Company's right for discipline or discharge over said employee. Disciplinary notices, to be considered as valid, must be issued by the Company and signed by the employee, with a copy to employee, and a copy to Union, by certified mail. If the employee refuses to sign, the notice must indicate. Suspension and discharges to be mailed by certified mail. Notice letters shall be specific, not general in nature, as to the alleged violation (i.e. time, date, place, and nature of violation).

> Section 4: Disciplinary notices signed by any employee shall not constitute an admission of guilt, but shall only indicate the employee is aware of the alleged violation. Letters of reprimand to Employees shall be considered as automatically protested and shall not be heard until such time as they are used as a basis for suspension or discharge. In no case, however, shall letters of reprimand be kept on file over a twelve (12) month period from date of issue.

Grievances were handled pursuant to Article 14 of the Ready Mix Agreement entitled "Grievance Procedure and Settlement of Disputes." The grievance procedure involved a 4 step process with the employee first attempting to resolve the dispute with his immediate supervisor followed by the aggrieved employee taking his grievance to the Union, who in turn with the employee, presents it to management followed by a presentation of the matter to a Board of Adjustment consisting of two members appointed by the Employer and Union. In the event that a majority of Board members cannot resolve the dispute, either party may refer the matter to binding arbitration. (RX-47, pp. 8-11).

Under Article 12 of the Ready Mix Agreement entitled "Elimination of Restrictions on Production" the Employer reserved the exclusive right to manage the business and direct its work force including the right to hire, suspend, transfer, promote, demote or discharge for just cause, relieve employees from duty because of lack or work and determine the number and schedule of shift. Further, Employer reserved the right to establish reasonable company rules provided such rule did not conflict with the union agreement.

Pursuant to its right to establish work rules, Respondent provided its drivers with a company manual notifying drivers of its commitment to safety, requiring compliance with safety rules including the attendance at safety meetings and notifying supervisors of unsafe conditions. (RX-46). Further, Respondent told its drivers that: (1) tardiness for work would not be tolerated and was cause for discipline; (2) pre and post-trip inspections reports had to filled out to insure truck safety; (3) loading procedure had to be followed including attendance by the driver while his truck is being loaded under the plant with the mixer drum fixed in the charge position. The manual further advised drivers of rules for operation on the road and on the job site; use of stand by time in the year for cleaning truck, taking on fuel and checking tires; use of truck radios for company business with avoidance of profanity; and completion of time cards on a daily basis. Driver were also advised at the end of the days to wash up and fuel their trucks and complete the post trip inspection for which they would be allowed 30 minutes. (RX-46, p.10).

In practice, Layton and other supervisors exercised discretion when imposing discipline taking into consideration the workers background and related circumstances, such as attitude and timing of events, preferring to retain rather than discharge drivers especially if they were making progress acting on the belief that it was better to keep known entity rather than hiring someone completely new off the street. (Tr.171-173).

B. Mason's Work History

From his employment in May, 1995 through April 27, 1999, Mason drove a ready mix concrete truck for Respondent without incident . [7] On April 28, 1999, Mason got into a verbal argument with a customer (Barella Concrete), refused to deliver concrete ordered by Barella, and notified Respondent, via his truck radio, about the dispute during which he used profane language in violation of Respondent's rule on radio usage. (RX-46, pp. 7, 8, 361-362). As a result, general manager, Stephen B. Benna issued Mason a written warning. (CX-2; RX-9). [8]

This warning was followed by another written warning issued to Mason by Layton on September 12, 2000 because of Mason's negligence in causing 5 cubic yards of concrete to be lost in loading operations. On that day while loading concrete, Mason had his mixer drum in a discharge rather than a charged mode resulting in the dumping of 5 cubic yards of concrete at Respondent's loading facility. (CX-3, RX-10, Tr. 118-130, 362-363). About 3 months later on December 14, 2000, Layton issued a third written warning to Mason for abuse of equipment involving the tearing off of a mud flap and the failure to properly clean his truck resulting in a buildup of concrete on a safety hook used to support a booster axle when not in service. When confronted by Layton, Mason became defensive asserting that he was unaware of the missing mud flap and claiming that other drivers who had used his truck while he was absent in August and September, 2000, were responsible for the concrete buildup. (RX-3-6; Tr. 124-127, 133, 174-178).[9]

In 2001, Layton gave Mason 4 additional warnings on January 24, 25; July 2,25. This was followed by Mason's suspension on August 2, and termination on August 7. Layton issued the January 24 written warning following a January 19,2001 incident in which Mason caused substantial damage to the plant's loading chute as he drove away while the loading chute was still connected to his truck's load hopper. When Layton confronted Mason with the damage he had caused by his lack

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[7] Mason usually drove a booster mixer truck with a rear end discharge carrying about 10 cubic yards of concrete and used primarily on early morning pours. (Tr. 142-144).

[8] Mason testified that the customer started cursing him and that when he radioed the dispatcher he merely repeated the customer's curse words. Further, and more important, Mason contends that he did not deliver the concrete because to deliver it to this residential customer would have blocked the street and created a safety problem by preventing ingress or egress by residents, ambulances, or emergency vehicles. (Tr. 210-212). Layton on the other hand, testified that there was no safety incident, and that even if Mason's truck was blocking a street it could easily have been moved. (Tr. 97, 98).

[9] Mason testified that when absent in 2000 for medical reasons, other drivers had allowed concrete to build up on his truck safety hook up, and thus, he was not responsible for excess buildup. Mason returned from medical leave on September 15, 2000, and thereafter, consistently drove his truck through December 14, 2000 when he received the warning for equipment abuse. (Tr. 327-333). Mason further denied that concrete build up was truck abuse. (Tr. 344-345).

of attention, Mason replied that he had a lot of things on his mind at that time. (RX-11, CX-5, Tr. 129). Layton issued the January 25 verbal warning after Mason took 1 hour and 15 minutes to wash out his truck as opposed to 30 minutes Respondent allowed to complete this task. (RX-12, CX-6; Tr. 131, 132).

On February 21, 2001, Layton and Chris Benna met with Mason in an effort to improve Mason's conduct. At the meeting Layton mention that he was concerned not only with damage to the plant's loading chute and the use of excess time to wash out his truck, but also, about instances wherein Mason either failed to show up for work or was late for work. Layton also mentioned instances wherein Mason failed to bring a superplasticer to commercial job sites, thereby disrupting the pour. Mason replied that he did not know Respondent's rules or procedures and that 7 other drivers had also damaged the loading hopper without any apparent discipline. (RX-13, CX-8; Tr.134, 135, 370-373). On that same day, Mason turned in a time card showing 8 hours of work, whereas in fact, he had only worked 7 1/4 hours. Benna discovered the excess charged time, confronted Mason who claimed he thought he was guaranteed 8 hours work, and deducted the excess charge telling Mason that 8 hours was only guaranteed if Respondent utilized a two shift schedule under Article 2, Section 4 of the union agreement. (RX-14,15, CX-7, 8).

On May 2, 2001, Layton approached Mason while he was in the process of delivering concrete to United Construction job-site at the South Town Crossing and questioned Mason about missing work on April 25, 2001 and several other days for personal reasons. When Layton said that was not acceptable, Mason claimed he became too upset to complete the pour and refused to continue working whereupon Layton took Mason off the clock, completed the pour, and drove the truck back to the plant. (RX-16, 17, CX-9; Tr. 178-180, 381-386).

On July 2, 2001 Layton gave Mason a third warning for failing to either call in or report for work on 5 days: April 25, May 28, 29, June 28 and 30, 2001. [10] Layton also accused Mason of leaving work early because of alleged tiredness. Layton reminded Mason that Respondent's customers demanded service requiring drivers to be dependable and report for work on time. (RX-18, CX-10; Tr.138-139). The events preceding that warning were as follows: On June 25, 2001, Mason worked 12 hours from 2:45 a.m. to 2:45 p.m. On June 26, 2001, Mason worked from 6:30 a.m. to 1:45 p.m., Complainant went home and slept about 6 hours. At about 9:30 p.m., Mason called the plant to confirm a reporting time of 11:30 p.m. and learned that his shift had been changed back to 6 a.m. the following day. Mason was unable to sleep and reported for work in an alleged fatigue state on June 27, 2001 at 6 a.m., and worked until 3:30 p.m. During that shift, Mason called the dispatcher and asked to go home because of fatigue and having fallen asleep on the job. The dispatcher replied that he could not let Mason off early. At the end of the day, Mason indicated on his driver daily worksheet that he had fallen asleep during a delivery, but admittedly never refused to drive that day.

Mason was scheduled to report back to work on June 28 at 6:00 p.m. but called in claiming he was too tired to work. Mason missed work on June 28 but worked the following day June 29

[10] Mason testified that he called in and informed Respondent on all days he would be absent. (Tr.436).

without complaint from 5:45 a.m. to 5:00 p.m. On that day, Respondent asked Mason to report for work on Saturday, June 30. Later that evening at about 9:00 p.m., Mason called Respondent telling them that he was not coming to work on Saturday, June 30, because he wanted the time off "to recover" but not because he was too fatigued to drive. (RX-24; Tr. 272-283, 401-409).[11]

On July 2, 2001, Respondent's management including Layton, Chris and Steve Benna, had a meeting with Mason during which Layton gave Mason a written warning for multiple un-excused absences on April 25, May 28, 29, June 28 and 30, 2001. (RX-18). During this meeting, Mason requested a later starting time. Respondent agreed and offered to let Mason drive a smaller truck which had a later starting time and was less demanding without loss of pay or seniority. Mason never accepted this offer. (Tr. 390-392, 465-466).

On July 25, 2001, Layton gave Mason a fourth warning because of his failure to attend a driver safety or mentor meeting for 4:30 a.m. while Mason was on duty. (RX-19, CX-11). Mason worked on July 24, 25, 26, 27, 30, 31; August 1 and 2, 2001. On July 31, 2001, Mason was scheduled to deliver 9.5 cubic yards of concrete to a Timber Lodge Project in South Lake Tahoe for Capitol City Concrete but delivered only 2.5 yards of concrete returning to Capitol's yard and dumping the remaining 5 to 7 yards in concrete block forms. As a result of Mason's action, Capitol had to make another delivery to the job site whereupon Capitol's operations manager, Frank Cavalier, informed Layton not to send Mason back on other Capitol jobs. (RX-21, CX-12).

On August 2, 2001, Respondent suspended Mason and then on August 7, 2001 terminated him for abuse of equipment pursuant to Article 13, Section 1 of the union agreement. The abuse of equipment involved the building up of concrete on Mason's truck, and in particular, the safety hook that supported the booster axle when not in use. (RX-1, CX-13). Layton considered Mason to be uncooperative refusing to even use the free time he had between loads or during the day to clean his truck. (Tr. 193-195, 205, 206). Mason filed a grievance over his termination but lost when that issue was presented to the Board of Adjustment, who by unanimous vote, upheld the dismissal. (RX-1, 2). Photos of Mason's truck taken on July 24, 2001 confirmed the concrete buildup. (RX-7, 8).

C. Protected Activities

Mason contends that he engaged in protected activity on seven occasions: April 28, 1999; November 22, 2000 (two occasions); January 25, 2001; February 27, 2001; May 1, 2001; June 27, 2001. On the first incident of April 28, 1999, Complainant refused to deliver concrete in a residential area because by so doing he would impair the ability of emergency vehicle to ingress or egress the area in which a home for the elderly was located. (Tr. 211-213). Moreover, if he attempted to move his truck with the discharge chutes attached an accident could happen unless the chutes were in plain

[11] A dispatcher receives customer orders and then assigned drivers to fill such by either radioing the dispatch to the driver for delivery that day or if the driver has already left for the day by leaving a telephone recording which the driver hears when calling the plant between 5 to 6 p.m. (Tr. 143, 144).

view. (Tr. 152-153). Mason testified that the customer would not work with him so he took the chutes off and returned to the plant. Layton on the other hand testified that a cement truck could be easily and safely moved with assistance from a chute man telling the driver when to pull up or back out and controlling chute movement. (Tr. 99,100).

On November 22, 2000, Mason refused to transport a container of "superplasticizer" because in his opinion there was no way to secure the container in his truck cab and if the container became dislodge it could interfere with safe operation of the truck by spilling and preventing him from proper use of a foot break. On that same day, Mason noted on a vehicle inspection report that his booster axle safety hook was inoperable. (CX-21, 23). On December 5, 2000, Mason reported a missing mud flap on a vehicle inspection report. (CX-24). On January 25, and February 20, 2001, Mason exceeded the 30 minute time limit in performing a post trip inspection and concrete wash out of his truck drum which were required under DOT regulations.[12] Commencing on February 27, 2001, and thereafter, on February 28, March 15, 21 and 26, 2001, Mason began noting on his daily work sheet an inability to complete the required post-trip inspection due to a lack of time. On February 27, and March 9, 2001, Mason also indicated on his vehicle inspection report an inability to do pre-inspection reports due to a lack of time. (CX-36, 37). Respondent's safety coordinator, Don Tobin, told Mason to do the required inspections. Mason resumed the inspections taking and getting paid for the additional time he alleged was necessary. (Tr. 254-258).

On May 1, 2001, Mason, arrived at a job site on highway 80 and discovered there were no flagmen or barriers to permit him to back up. Mason refused to unload, called the plant and talked to Alex Benna asking him to have Tobin review the job site. When Tobin failed to return the call or come to the site, Mason waited for the traffic to clear and once he saw enough room to deliver the concrete he did. The next and last incident of alleged protected activity occurred on June 27, 2001 when Mason called Alex Benna and requested permission to go home early due to excessive fatigue which had already cause him to go to sleep on the job. According to Mason, he had been unable to sleep from 9:30 p.m., on June 26, until he arrived at work at 6:00 a.m., on June 27, due to a change of schedule. On June 26, Respondent initially scheduled Mason to report for work that night at 11:30 p.m.,but notified Mason when he called the plant at 9:30 p.m. to report for work at 6:00 a.m. (Complainant's normal reporting time).[13]

D. Verbal and Written Warnings

Mason contends that Respondent gave him verbal and written warning in retaliation for his protected activities. Concerning the April 24,1999 incident wherein Mason cursed over the radio,

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[12] 49 C.F.R. § 392.7 requires a driver to inspect and make sure his truck is in good working order before driving.

[13] In his brief, Mason noted that on July 26, 2001 he was told at 4:45 p.m. to report for work at midnight which was only 7 1/4 hours later, and that as a result, was only allowed to sleep 3 ½ hours.

Mason claims and testified that it was a common practice for employees to curse over the radio with impunity and that he heard such language at least twice a week. Former employee Larry Smith also testified that he heard employees use profanity over Respondent's radio. Mason however glosses over the fact that another driver, Frank McDonald, received a written warning on April 28, 1999 for the same thing Mason did and that Respondent had verbally admonished other drivers for similar misconduct. (CX-102; RX-27, Tr.77).

Concerning the December 14, 2000, warning for tearing off a mud flap and allowing concrete build up, Mason contends that other drivers who had driven his truck over a 7 week period from mid July to mid September, 2000, when he was off on sick leave, were responsible for such and that Layton ignored Mason's explanation because two weeks earlier Mason had refused to transport a container of superplasticizer in the cab of his truck and had reported concrete build up. Mason ignores the fact that he had been driving the same truck over a 3 month period and was required to inspect the truck on a daily basis and remove excess concrete. Further, Mason did not report a concrete build up, but rather, told the mechanic (Robert Vanderpool (RV) that the hook for the booster axle was not working and that Vanderpool was the one to notice an excessive concrete buildup. (CX-25; RX-3, Tr. 125, 174, 175, 177).

Concerning the warnings of January 25, and February 21, 2001, Mason contends that Layton issued those warnings because he had filed internal safety complaints about having insufficient time to perform either pre or post-trip safety inspections. Smith testified that drivers on going to work were expected to do a pre-trip inspection where they would walk around and check the truck. This would normally take about 15 minutes after which the truck pulled under the plant and was loaded and then washed off. The driver then went to the job site, unloaded, and washed off his truck and returned to the plant for additional loads. (Tr. 73-77). At the end of the day, the driver had a half hour to wash out and fuel his truck and do paper work. According to Smith, this process took about 30 to 45 minutes. If there was not enough time at the end of the day to do this, the driver could use free time the following day to finish washing and if necessary could use a hammer to chip away excess concrete. Further, drivers did not always have sufficient time in the morning to always do a pre-trip inspection. (Tr. 80-87).

After reviewing the entire record, the Court is convinced that Layton issued the January 25, 2001, warning because Mason charged excessive time (1 hour and 15 minutes) to allegedly clean his truck without providing any explanation for such action. Regarding the February 21, 2001, meeting where Mason was again accused of using excessive time for truck washing as well as showing up for work late and failing to bring superplasticer to job sites, Layton credibly testified that it was common practice to transfer the superplasticer in the truck cab and that such had been done without incident. Further, Mason never denied coming to work late or explaining the need for excessive wash time. In fact safety coordinator Tobin told Mason to take time to do the necessary pre and post-trip inspections and cleaning and paid him for the time charged. Mason never provided any satisfactory explanation for not being able to use free time during the day to wash or clean his truck properly.

Regarding the verbal warning of May 2, 2001, wherein Layton approached Mason on the job-site and questioned him about excessive absenteeism for personal reasons, Mason contends that

Layton criticized his attendance only because of an incident on May 1, 2001 when he called the plant and reported a safety hazzard on Highway 80 which delayed delivery. The record however does not contain any evidence to connect the incidents or suggest retaliation for reporting the safety hazzard. Rather, it shows that Tobin complimented Mason for properly accessing the situation stating it was a "good call."

Mason contends that the July 2, 2001 warning for excessive absenteeism was pre-textual because on two of the days in question, (May 28 and 29, 2001), he had approved vacation and on the other days, (April 25, June 28 and 30, 2001), he either called in or approved absences. Concerning the refusal to drive on June 28 the record shows the following: On June 25, 2001, Mason worked 12 hours from 2:45 a.m. to 2:45 p.m. Mason was then off about 16 hours and reported for work on June 26, 2001 at 6:30 a.m. and worked until 1:45 p.m. Mason was scheduled to report back for work later that day at 11:30 p.m., went home and slept for about 6 hours and then called the plant at 9:30 p.m. only to learn that his schedule had been changed and that he did not have to report for work until June 27, 2001, at 6:00 a.m. On June 27, 2001, Mason worked from 6:00 a.m. to 3:30 p.m., after having been off duty for almost another 16 hour period. On June 28, 2001, Mason called in saying he was taking off that day. On the following day June 29, 2001 he reported for work at 5:45 a.m. and worked to 5:00 p.m. without noting any fatigue problem on his driver daily log. Later that evening at about 9:00 p.m. Mason called the plant for his starting time on June 30, 2001 and informed Respondent he would not be in due to the fact that he needed time off to recover (not due to fatigue) from the past week's work. (Tr.401-407). Given the time off between job assignment the Court finds no objective basis for Mason's alleged fatigued complaints and certainly no basis for refusing work on June 28 or 30, 2001.

C. Discipline of Other Drivers.

Mason contends that when Respondent suspended him on August 2, 2001, and thereafter discharged him on August 7, 2001, it had no legitimate reason for such action. Rather, the reasons advanced were pre-textual and evidence of disparate treatment. Mason argues that while his truck had concrete build up it did not constitute a safety hazzard because Layton allowed Mason to drive it for substantial hours on July 25, 26, 27, 30, 31 and August 1 and 2, 2002 after having documented significant concrete by July 24, 2001. Pictures of Mason's truck on July 24, 2001 unquestionably show several inches of concrete build-up (4 to 5 inches). (RX-7, Tr. 178-188). Mason argues that inasmuch as Respondent made no attempts to remove the concrete between July 25 and August 2, 2001, such inaction indicates either the build up did not constitute a safety hazzard, or it if did, then Respondent by permitting the build up to exist while Mason was driving the truck was tantamount to an admission that Respondent was not concerned about safety, but rather, was motivated by Mason's protected activities. The error with this argument is simply there is no evidence to show either one way or another what the condition of the truck was like after the pictures were taken.[14]

[14] The record shows only one other instance wherein a driver was disciplined for abuse of equipment. On October 16, 2000, Respondent terminated driver, Darrin Lambert for recklessness and abuse of equipment when he caused his mixer to flip over as he was exiting highway I-80,

Regarding the issue of disparate treatment, Mason claims that Respondent issued only one other written reprimand for profanity to driver, Frank McDonald, on the same day, April 28,1999, that Mason received his warning letter, and thus, it applied this rule in a disparate manner. Mason ignores the fact that Respondent had admonished other employees for similar conduct. Mason also cites as evidence of disparate treatment, the fact that driver Paul Howard received only a written warning for allowing excess concrete build-up. As can be seen in the chart below, Howard received a written warning for allowing excess build up on November 24, 2001. (CX-107). However, such build-up according to Layton was no more than 1/8 to 3/8's of an inch. (Tr. 154-157). Further, there is no evidence to suggest that Howard repeatedly neglected his truck as was evident in Mason's case. Mason also cited the case of Kory Gibson who on February 3, 2000 was suspended for 5 days for backing into a parked truck on a job site followed by two written warnings on September 27, 2001 and March 1, 2002, wherein he damaged a truck axle and rear end and ran into an overhead power line. (CX-119-122, RX-30). Layton admitted he could have fired Gibson, but thought he could work with Gibson who in his opinion had used bad judgment, as opposed to Mason, who had not used bad judgment but rather was guilty of deliberate abuse of equipment by refusing to properly inspect and remove excess concrete.

Mason asserts that he is unable to address each incident of disparate treatment, but claims Respondent's treatment of employees J.D. Drucker, Bobby Pratt, and Todd Kristen wherein Respondent imposed less severe discipline is evidence of such treatment. The discipline of those and other employee appears in the following chart:

Employee	**Exhibit**	**Date**	**Incident**	**Discipline**
J. D. Drucker	CX-86,87	January 14, 2000	running over fire hydrant at cost of $1,1039.74	suspended 5 days
J. D. Drucker	CX-88	November 8, 2000	failing to report accident and damage to right front fender	suspended 3 days
J.D. Drucker	CX-89, RX-33	Undated	not working or leaving work early on 4 days in September and October, 2000	written warning
J.D. Drucker	CX-90, RX-34	November 20, 2000	destroyed truck tire	termination
Vernon Stallard	CX-94	April 30, 1999	backed into contractor truck	suspension
Vernon Stallard	CX-95	October 28, 1999	backing accident	suspended 2 weeks

which in turn, caused another vehicle to swerve and hit a curb. (CX-93).

Vernon Stallard	CX-96	August 9, 2001	reporting to job with incorrect slump (concrete too wet)	written warning
Bobby Pratt	CX-97	April 21, 1998	delivering incorrect slump to job site	written warning
Bobby Pratt	CX-98	April 5, 1999	backing over traffic semaphore	written warning
Bobby Pratt	CX-99	August 9, 2001	delivering incorrect slump to job site	written warning
Bobby Pratt	CX-100 RX-40	February 5, 2002	discharging concrete on street and on parked vehicle	written warning
Frank McDonald	CX-101	November 24, 1998	not wearing hard hat on job site	written warning
Frank McDonald	CX-102, RX-27	April 28, 1999	use of obscene language over radio	written warning
Frank McDonald	CX-103	February 25, 2000	delivering incorrect slump to job site	written warning
Frank McDonald	CX-104	January 2, 2002	delivering incorrect slump to job site	written warning
Frank McDonald	CX-105	March 19, 2002	backing into van and causing minor damage	written warning
Paul Howard	CX-106	May 24, 2000	running into parked pickup with chute	suspended for 3 days
Paul Howard	CX-107	November 24, 2001	allowing excess buildup of sand, rocks and concrete	written warning
Paul Howard	CX-109	December 30, 2002	delivering incorrect slump to job site	written warning
Todd Kirsten	CX-110	March 24, 2000	leaving truck unattended	written warning
Todd Kirsten	CX-111	August 21, 2000	hitting rebar and damaging tire for cost in excess of $5,700	suspension
Todd Kirsten	CX-112	September 24, 2002	horseplay	written warning
Steve Carr	CX-113	March 24, 2000	running into curb during pouring process	written warning
Steve Carr	CX-114, DX-32	May 24, 2000	failing to dump wash water from day before	written warning

Steve Carr	CX-115, RX-35	March 15, 2002	backing into main plant with truck hopper in up position causing minor damage	written warning
Gary Knight	CX-116	April 5, 1999	backing into another truck	written warning
Gary Knight	CX-117	May 5, 1999	leaving roadway, driving onto privately owned parking area and tearing down low hanging power lines	suspension for 2 days
Gary Knight	CX-118	undated	failing to perform daily inspections required by D.O.T.	written warning
Kory Gibson	CX-119, RX-28	February 3, 2000	backing into parked truck on job site	suspension for 5 days
Kory Gibson	CX-120, RX-29	September 27, 2001	damaging truck axle trying to pull out stuck loader and then driving to and from job-site causing further damage to truck	written warning
Kory Gibson	CX-121 122, RX-30	March 1, 2002	hitting overhead power line with top of mixer	written warning
Tim Kuhl	CX-123	November 21, 2001	backing into another truck resulting in $2,500 in damages	suspension
Tim Kuhl	CX-124, RX-43	August 23, 2002	poor attitude concerning scheduling time off for personal business	written warning
Tim Kuhl	CX-125	September 25, 2002	backing accident damaging tail light that caused short circuit and shut down truck, not reporting accident, and failing to do post trip inspection	suspension for 1 day.
Temple Webb	CX-126	October 9, 2001	making improper poor at job site	written warning
Temple Webb	CX-127, RX-41	April 12, 2002	backing into another mixer causing damage to ladder/mixer control, main hopper and chute motor	suspension for 3 days
Temple Webb	CX-128	February 6, 2003	failing to do proper pre-trip inspection	written warning

Larry Smith	DX-26	August 27, 1998	backed truck into parked pickup	written warning
Jeff Engen	RX-31	April 24, 2000	failing to work on 2 days in April for personal reasons	oral warning
Ross Carr	RX-36	August 2, 2000	dumping of concrete at wrong site	written warning
Terry Hortsman	RX-37	January 8, 2001	refusing to load truck	suspension for 5 days
Terry Hortsman	RX-38	July 29, 2002	left work without notifying supervisor	written warning
Terry Hortsman	RX-39	August 6, 2002	refused to load	termination
Lloyd Bonari	RX-42	June 10,11, 2002	improper chute placement	written warning
Robert L Smith	RX-44	March 4, 2003	failure to call in or show up for work	termination

Drucker was disciplined on four separate occasions from January 14, 2000 to November 20, 2000 during which time he warned, suspended twice, and finally terminated for leaving work early, failing to report an accident, damaging truck tires and fire hydrant. Bobby Pratt received four written warnings from April 21, 1998 to February 5, 2002 for delivering concrete with incorrect slumps, damaging a traffic semaphore, and discharging concrete on a street and parked vehicle. Todd Kristen received two written warnings and a suspension over a period from March 24, 2000 to September 24, 2002 for leaving his truck unattended, horseplay, and damage to rebar and a truck tire.

After reviewing the above chart, the Court finds nothing to confirm Mason's assertion of disparate discipline. Rather, it appears as Layton testified that each case was reviewed on its own merits with Respondent exercising discretion trying to work with and educate drivers rather than impose discipline. As evidence of this policy Respondent periodically posted notices at the plant informing drivers of work rules covering a variety of subjects including wearing of hard hats, turning in logs, cleaning trucks, not stopping for personal business while hauling loads, use of headlights on early morning pours, dumping of excess concrete, reporting safety hazzards, harassing fellow employees, failing to perform post-trip inspections and failing to report for work or showing up late for work. (CX-64 through CX-76). Of particular interest were those notices related to truck cleaning issued on February 28, 2000, July 29, 2002, and March 3, 2003. (CX-66, 72, 73, and 76). Respondent was obviously concerned about truck cleanliness because of the safety issue presented by loose concrete hitting other vehicles while in transit to or from job site, as well as the cost incurred with truck painting.

E. Discussion, Conclusion, and Recommended Order

In order to prevail on a retaliatory discipline or discharge claim under the Act, a complainant must prove: (1) he/she engaged in protected activity under the Act; (2) the employer took adverse employment action against him/her; and (3) the employer's reason(s) for the adverse action were discriminatory and due to the protected activity. *BSP Transp Inc. v. U.S. Department of Labor,* 160 F.3d 38 , 46(1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich,* 55 F.3d 41, 46 ((2nd Cir. 1995); *Moon v. Transport Drivers, Inc.,* (6th Cir. 1987) ;See *Yellow Freight System, Inc. v Reich,* 27 F.3d 1133, 1138 (6th Cir. 1994). Such claims are often analysed under the familiar burden shifting framework of *Mc Donnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). However, where as here the employer has satisfied its burden of producing evidence of a non-discriminatory reason for adverse action the *Mc Donnell Douglas* framework falls by the wayside with the trier of fact faced with the ultimate question of whether the employer intentionally discriminated against complainant or whether complainant established the elements of his/her case by preponderance of credible evidence.

In the present case, the Court is not convinced that Complainant was engaged in protected activity when he got into a verbal argument with a customer on April 28, 1999 for as Layton credibly testified the vehicle could easily have been moved if it in fact blocked an entrance and in fact another driver made the delivery without incident. The Court is also not convinced that carrying a container of superplasticizer in a truck cab creates a safety hazzard so as to violate any motor vehicle standard or create a objective reasonable belief that operation of a motor vehicle while carrying such would pose a risk of serious injury to either the driver or public. Indeed, credible testimony from Layton showed such carriage had been done without incident. Reporting missing or malfunctioning equipment or inadequate time for either pre or post-trip inspection pertain to motor vehicle standards and are protected. Reporting unsafe delivery conditions also constitutes protected activity as does reporting excess fatigue. However, under the facts of this case Complainant had no objective basis for complaining about excess fatigue given the length of time between scheduled deliveries.

Concerning the issue of adverse employment actions the record clearly shows Complainant being warned on repeated occasions, suspended, and eventually discharge. However, other than timing there is no nexus or connection between adverse employment actions and any protected activity. Respondent warned Claimant on April 28, 1999 for cursing over the radio. On the same day it also warned McDonald because of similar misconduct. Further, Respondent had admonished other employees for similar conduct. On December 14, 2000, Respondent legitimately warned Complainant about truck abuse, i.e., tearing of a mud flap and allowing concrete to buildup on the truck inasmuch as he was responsible for noting and correcting such conditions.

Concerning warnings issued on January 24, 25 and February 21, 2001, Respondent issued those warnings not because of safety complaints but because Complainant caused substantial damage to the plant's loading chute and took excessive time up to 1 hour and 15 minutes for pre and post-trip inspection which at most should have been accomplished in 30 to 45 minutes. Warnings for excessive absenteeism in April, May, and June, 2001 were not related to any objective and reasonable safety complaint such as excess fatigue considering the length of time between schedules. While Complainant may have been on scheduled vacation on May 28,29, 2001, Complainant had no legitimate reason for

refusing deliveries on April 25, June 28 and 30, 2001. Respondent had just cause for warning Complainant on July 25, 2001 for failing to attend a driver mentor meeting on July 24, 2001, inasmuch as he was still at work when it was conducted and was told to attend.

Moreover, Respondent had a legitimate reason for suspending and discharging Mason for truck abuse in allowing against employer rules build up of excess concrete. When Complainant refused on July 31, 2001 to deliver concrete to the Timber Lodge project, he provided Respondent with another legitimate basis for suspending and discharging him.

In essence, the Court finds that Respondent had ample justification for warning, suspending and discharging Complainant and that no discipline imposed on Complainant had anything to do with protected activity. Accordingly, the Court finds no merit to Mason's complaint and recommends dismissal of such.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded by the Administrative Review Board, U. S. Department of Labor, Room S-4309, 200 Constitution Ave., NW, Washington, D.C. 20210 *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978(1996)